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No. (1) _____

In The
Supreme Court of the United States

THE VILLAGE OF MUNDELEIN, ILLINOIS,
Petitioner,

v.

WISCONSIN CENTRAL RAILROAD,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Railroad Safety Authorization Act ("FRSAA"), 49 U.S.C. § 20106 (2007) preempts local governments from enacting laws related to *railroad safety* if the United States has issued regulations on the same subject matter. The questions presented are:

1. Whether local regulations prohibiting trains from blocking highway-grade crossings, through non-movement, relate to "railroad safety."

2. Whether federal regulations governing maximum train speeds, air brake testing, and grade crossing warning regulations "cover" the subject matter of local regulations which require trains to move through a grade crossing.

3. Whether the FRSAA's savings clause preserves the ability of local governments to require train operators to move trains through highway grade crossings within a specified time limit after stopping if it is within their reasonable control to do so.

RULE 29.6 STATEMENT

Petitioner, the Village of Mundelein, Illinois, is a local government entity not subject to Rule 29.6. The Village of Mundelein was the plaintiff-appellant below and is a municipal corporation incorporated under the laws of the State of Illinois. It has no parent corporation.

Respondent is the Wisconsin Central Railroad, whose parent company is Canadian National Railroad. Wisconsin Central Railroad was the defendant-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review the judgment and opinion of the Illinois Supreme Court decided on January 25, 2008.

OPINIONS BELOW

The opinion of the Illinois Supreme Court is reported at 227 Ill.2d 281, 882 N.E.2d 544, (Petition Appendix ("App.") 1a-24a). The Illinois Appellate Court for the Second District opinion is reported at 367 Ill.App.3d 417, 855 N.E.2d 230, (App. at 25a-50a). The trial court's decision is not reported but is contained in a transcript of the trial proceedings, the relevant portion of which is reproduced in the Appendix to this Petition. (App. at 51a-57a).

JURISDICTION

The judgment of the Circuit Court for the 19th Judicial Circuit, Lake County, Illinois, was entered on April 22, 2005. The Appellate Court of Illinois, Second District, entered judgment on September 6, 2006. The Supreme Court of Illinois entered a final judgment on January 25, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

Pursuant to Sup. Ct. Rule 14.1(e), the Petitioner states that 28 U.S.C. § 2403(b) may apply and a copy of this Petition has been served on the Attorney General for the State of Illinois.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the United States Constitution provides in relevant part: [T]he laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. CONST. art VI, cl. 2.

The relevant portion of the Federal Railroad Safety Authorization Act of 1994, 49 U.S.C. § 20101, *et seq.*,("FRSAA"), provides:

> Laws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation or order related to railroad safety . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order
>
> (1) is necessary to eliminate or reduce an essentially local safety or security hazard;
>
> (2) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106 (2007).

The Village of Mundelein ordinance at issue provides:

> Except insofar as the application thereof is clearly impractical or inappropriate, in view of the context or purposes thereof, all of the definitions, requirements, regulations, prohibitions, provisions and sections of the Illinois Motor Vehicle Code, as amended, (Illinois Revised Statutes, Chapter 95-1/2, Section 1-101 and 20-402, inclusive) are by reference adopted as ordinance definitions, requirements, regulations, prohibitions, provisions and sections of the village vehicle code. Any and all violations of Illinois Revised Statutes, Chapter 95-1/2, Sections 1-101 to 20-402, inclusive, as amended, shall be considered violations of this chapter and each such violation shall subject the violator thereof to the penalty provisions of this chapter; and the section numbers of the Illinois Motor Vehicle Code are adopted as section numbers of this code and may be cited as such.

Village of Mundelein, Illinois, Ord. 89-4-12 § 1(A) (1989).

The relevant portion of the Illinois Vehicle Code provides:

> (b) Obstruction of Highway at Grade Crossing Prohibited. It is unlawful for a rail carrier to permit any train, railroad car or engine to obstruct public travel at a railroad-highway grade crossing for a period in excess of 10

> minutes, except where such train or railroad car is continuously moving or cannot be moved by reason of circumstances over which the rail carrier has no reasonable control.

625 Ill. Comp. Stat. 5/18c-7402(1)(b)(West 2004) (recodifying Ill. Rev. Stat. Chapter 95 1/2).

The relevant portions of the Code of Federal Regulations, 49 C.F.R. 213.9(a) (2007) and 49 C.F.R. 232.211 (2007), and 49 C.F.R. 234.105, 234.106, & 234.107 (2007) are set out at App. 58a-63a.

STATEMENT OF THE CASE

This case presents important, recurring issues regarding the extent to which Congress preempted State and local governments' authority to regulate railroad conduct under the FRSAA. Specifically, this case presents the question of whether Congress intended to preempt local government authority to prohibit railroad operators from obstructing highway grade crossings for more than a specified amount of time when the operator has reasonable control over the obstruction. A highway grade crossing is an intersection of a railway and a public road at the same level. *See,* Federal Railroad and Highway Administrations, U.S. Dep't of Transportation, RAILROAD-HIGHWAY SAFETY PART II: RECOMMENDATIONS FOR SOLVING THE PROBLEM 2 (1972) (defining "public grade crossing").

Originally enacted in 1970 as the Federal Railroad Safety Act ("FRSA"), 45 U.S.C. § 421 *et seq.*, the FRSAA aimed to reduce railroad-related accidents and

deaths and to improve rail safety generally. *See*, *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 661-62 (1992). The FRSAA empowers the Secretary of Transportation, through the Federal Railroad Administration, to promulgate regulations to improve railroad safety. *Id.*

While the FRSAA contains an express preemption clause with respect to "railroad safety," two express savings clauses cabin the reach of the express preemption provision. The first of these clauses preserves state and local government authority to regulate on matters of railroad safety until the Secretary issues regulations which substantially subsume the same subject matter of state law. The second clause allows state and local governments to regulate even on those matters, provided the local regulation is not incompatible with the federal regulation, addresses a local safety hazard, and does not unduly burden interstate commerce. *See*, 49 U.S.C. § 20106.

A. Statement of the Facts Prior to and During Wisconsin Central's Obstruction of Hawley Street

On January 17, 2005, Wisconsin Central Railroad's train #A442 was scheduled to travel through the Village of Mundelein, Illinois, with Bernard Kareka acting as conductor of the train. Mr. Kareka and an engineer took over operation of train #A442 in Lake Villa, Illinois, after the train had been left there by the previous crew, en route from Fond du Lac, Wisconsin to Schiller Park, Illinois. App. at 2a.

The previous crew stopped train #A442 several hours before Mr. Kareka and the train's engineer arrived, leaving a note indicating the train had "bad air." App. at 2a-3a. A bad air notation is commonly understood to indicate the train had experienced a problem with the air brakes. After conducting required federal testing, Mr. Kareka and his engineer set off toward the Village of Mundelein and points beyond. Shortly after the train was underway a "hot box detector" alarm sounded, indicating the rear of the train was dragging equipment. App. at 3a-4a.

In response, the engineer began to slow down the train to a stop. Instead of responding normally to the engineer's braking, the train went into an emergency brake application situation. The emergency brake application was caused by a loss of air pressure, resulting in the sudden stopping of the train. App. at 4a.

Because the air pressure in the brake system did not return to its minimum required levels, Mr. Kareka conducted a visual inspection of the train. He noticed that the train had become separated about seventy-six cars back from the locomotives due to a broken draw bar between the cars. Mr. Kareka also noticed that there was an angle cock that was only partially open about six cars ahead of the break in the cars. App. at 4a.

Angle cocks act as valves to allow air to travel throughout the air brake system. When an angle cock is partially opened, less air travels to the rear of the train, causing the brakes to be applied sooner on the portion of the train forward of the partially open angle

cock than on the rearward portion. This uneven application of the brakes can cause the rear cars to run into the cars in the front. Mr. Kareka removed the train car with the broken draw bar, repaired an air hose rupture, and rejoined the remaining sections of train. App. at 4a-5a.

Significantly, at that time, the brake system displayed sufficient air pressure to allow the train to proceed south to Maple Street in Mundelein, where the rear car with the dragging rigging could be removed, or "set out," from the train. App. at 5a.

While the rear car was being set out the highway-grade crossings at Hawley Street and Park Street, both located in Mundelein, were blocked by train #A442.

While the rear car of train #A442 was being removed, a northbound suburban Chicago commuter (Metra) train arrived at the Mundelein train station. However, the Metra passengers could not get from the platform of the train station to the parking lot because the southbound Wisconsin Central #A442 train blocked the access to the parking lot from the platform. App. at 5a.

Mr. Kareka separated the Wisconsin Central train so the commuter passengers could get across the platform. After the commuter passengers had cleared the tracks Mr. Kareka rejoined the train and conducted federally required air brake testing. At that time, Mr. Kareka was unable to get sufficient air pressure in the brakes to allow the train as constituted to proceed to its final destination. App. at 5a.

While other train personnel tried to resolve the air pressure problem, a southbound Metra train stopped at the Mundelein commuter train station. Again, Mr. Kareka separated the train to allow the commuter passengers to cross the tracks to get to the parking lot. Because the problem with the air brake pressure could not be resolved, the dispatcher for Wisconsin Central Railroad ordered the front end of the train with sufficient air brake pressure to proceed south to Schiller Park, Illinois. App. at 6a.

At that point, train #A442 had obstructed Hawley Street for 157 minutes. App. at 6a.

In response to the two hour and thirty-seven minute obstruction of Hawley Street, the Village of Mundelein issued a $14,000 citation to Wisconsin Central Railroad for violating Village of Mundelein's ordinance adopting 625 Ill. Comp. Stat. 5/18c-7402(1)(b)((prohibiting the obstruction of a highway-grade crossing in excess of ten minutes). App. at 56a.

B. Statement of the Lower Court Proceedings

On April 22, 2005, Judge Raymond D. Collins conducted a bench trial with respect to whether Wisconsin Central Railroad violated the Village's ordinance. The parties stipulated that the Hawley Street grade crossing was blocked for 157 minutes.

Wisconsin Central Railroad solicited testimony designed to support its affirmative defense that the obstruction blockage was due to circumstances which were beyond its reasonable control. Wisconsin Central Railroad also argued that the Federal Railroad Safety

Act ("FRSA") preempted the Mundelein's grade crossing obstruction ordinance.

Judge Collins found the reasons for the grade crossing obstruction were within the reasonable control of Wisconsin Central Railroad. Judge Collins noted the conductor's decision to split train #A442 to prevent inconveniencing the Metra passengers in reaching their automobiles. The trial court further found that Mundelein's ordinance was not preempted by the FRSA on the facts of the case. Therefore, the trial court found the Wisconsin Central Railroad guilty of obstructing the grade crossing at Hawley Street for 157 minutes and imposed a fine of $14,000 plus court costs. App. at 51a-56a.

Wisconsin Central Railroad appealed, asserting that the FRSA preempted the ordinance and that the trial court's decision imposed additional duties on it that were preempted by FRSA. The Illinois Appellate Court agreed that federal law preempted the Village's ordinance and reversed. The Illinois Appellate Court ruled that the ordinance related to railroad safety, that the Federal Railroad Administration had issued regulations covering the subject matter of the Village ordinance, and that the ordinance did not meet the requirements of the FRSA's savings clause.

The Village of Mundelein then petitioned the Illinois Supreme Court to hear the case. That court granted the petition and upheld the Illinois Appellate Court decision, addressing only the federal preemption issue. App. at 8a, 24a. The Illinois Supreme Court also found that the Village's ordinance related to railroad safety because the state statute incorporated by the

Village's ordinance is titled Safety Requirements of Railroad Operations. The court determined that the plain language of the Village ordinance applied to railroad operations. On this basis, the court concluded the ordinance was related to "railroad safety." App. at 11a.

The court also determined the Secretary has issued regulations "covering" the subject matter of the Village's ordinance. First, the court held that the subject matter of the Village ordinance governed train movement. App. at 14a.

The court identified several of the Secretary's regulations and determined that a combination of three regulations resulted in the Secretary's having issued regulations governing the "movement of trains."

> These various regulations on train speed, air brake testing, and grade crossing safety work together to regulate and control the movement of trains at grade crossings. They control whether a train may be moved and the speed of a moving train. Taken together, the overall structure of these regulations substantially subsumes the subject matter of the movement of trains at grade crossings. We, therefore, find that the regulations manifest a clear intent to preempt the Village's ordinance on that subject matter.

App. at 17a.

The regulations used by the court to reach its conclusion that the Secretary has regulated "train

movement" are the regulation governing maximum speed limits on certain classes track, (49 C.F.R. 213.9a (2007)) the regulation governing air brake testing for trains in circumstances similar to those taking place in Mundelein(49 C.F.R. 232.211 (2007)), and several regulations governing grade crossing safety (49 C.F.R. 234.105, 234.106, & 234.107 (2007)). The court did not address the underlying facts or trial court's holdings. App. at 24a.

REASONS FOR GRANTING WRIT

Historically, the balance of authority in our dual federal-state system has been an issue of importance to this Court. Preemption should not be inferred from every Congressional enactment that overlaps state regulation. Instead, this Court assumes "that the historic police powers of the State [are] not to be superseded by [a federal statute] unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, (1947). This Court's cases have established that state law is preempted under the Supremacy Clause, U.S. CONST. art. VI, cl. 2, in three circumstances. First, Congress can define explicitly the extent to which its enactments preempt state law. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-98 (1983), *Easterwood*, 507 U.S. 658. The FRSA contains an express preemption clause.

The second form of preemption recognized by this Court arises when a state regulates a field Congress intended the federal government to occupy exclusively. Congress's intent is inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to

supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice*, 331 U.S. at 230. The FRSAA presents no issue of inferred, or implied, field preemption. The FRSAA's text makes clear that Congress expected state and local governments to regulate in those areas of railroad safety where the federal government had not yet regulated. Further, even in those areas, the text of the FRSAA's second savings clause shows that Congress anticipated state and local governments would regulate certain areas despite the existence of federal regulations on the same subject matter.

The third type of preemption recognized by this Court is conflict preemption, which is another form of inferred or implied preemption. Conflict preemption arises in two situations: Where it is impossible for a private party to comply with both state and federal requirements, *see, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See also Maryland v. Louisiana*, 451 U.S. 725, 747 (1981). While, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), suggests that the existence of an express preemption clause forecloses implied preemption analysis, *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995), held this was not a hard and fast rule. It is unclear whether implied conflict preemption applies under the FRSAA. In *Easterwood*, this Court rejected a challenge seeking to preempt state law tort claims based on an alleged

implied conflict with federal regulations issued under the FRSAA. *Easterwood*, 507 U.S. 658, 673, n. 12, (1993) ("We reject petitioner's claim of implied 'conflict' preemption . . . on the basis of the preceding analysis").

This case presents the question of how the presumption against federal preemption and the preemption principles outlined above apply to state health and safety regulation in the context of the express preemption provisions of the FRSAA. The presumption against preemption is especially strong with respect to state or local regulation of matters of health and safety. *See, Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985). Further, "FRSA preemption is even more disfavored than preemption generally." *Rushing v. Kansas City S. Ry. Co.*, 185 F.3d 496, 515 (5th Cir. 1999) (internal citations omitted).

The Illinois Supreme Court's decision conflicts with this basic principle of FRSAA preemption. The decision is also in conflict with federal courts of appeal and other state courts with respect to the proper analysis to be engaged in when faced with a claim of FRSAA preemption. Because the question of the preemptive scope of the FRSAA with respect to regulating railroad carrier's blockage of public thoroughfares is of critical importance throughout the Nation, the Petitioners urge this Court to grant the Petition.

I. THE ILLINOIS SUPREME COURT'S DECISION CONFLICTS THIS COURT'S PREEMPTION TEACHINGS

The FRSAA preempts any State law, rule, regulation, order, or standard relating to railroad safety unless certain requirements are met. As this Court recognized in *Easterwood*, preemption under the FRSA is not easily achieved because Congress memorialized the general presumption against federal preemption in the very text of the two express savings clauses of the FRSA. These savings clauses surround the express preemption provision. *Easterwood*, 507 U.S. at 665, 668 (1993). The Illinois Supreme Court committed a series of errors resulting in its failure to give Mundelein's ordinance the deference this Court requires, bringing its decision squarely in conflict with this Court's federalism principles.

A. The Illinois Supreme Court Erred In Holding Mundelein's Ordinance Related to "Railroad Safety"

To prevail on the claim of preemption, a railroad first must establish that the state law at issue addresses "railroad safety," as that term is understood in the FRSAA. This Court has not addressed the definition of "railroad safety." Congress employed, but did not define, the term "railroad safety," in the FRSAA. In *Easterwood*, the Court examined whether a common law negligence tort for unsafe operation of a train was preempted by any of several federal regulations issued by the Secretary. This Court determined that the "legal duties imposed on railroads by the common law fall within" the broad phrase "law,

rule, regulation, order, or standard relating to railroad safety." *Easterwood*, 507 U.S. at 664. The *Easterwood* Court stated that to find preemption required finding evidence of Congress's preemptive purpose in the text and structure of the statute at issue. *Easterwood*, 507 U.S. at 664, citing *Shaw*, 463 U.S. at 95. The *Easterwood* Court impliedly recognized that the FRSAA only applies to state and local government laws designed to improve railroad safety. *Easterwood*, 507 U.S. at 665-75.

Without engaging in an in-depth analysis of the meaning of "railroad safety" as contained in the FRSAA, the Illinois Supreme Court opined that Mundelein's ordinance related to "railroad safety" because it affects railroad operations and included the term "safety" in the title. If the Illinois Supreme Court had followed this Court's admonishment to find evidence of Congress's preemptive purpose in the text and structure of the statute, it would have reviewed the FRSA with consideration for what "railroad safety" means in the context of the statute. Such a review should have lead to the conclusion that a State or local law requiring the movement of a train through a highway-grade crossing, and out of the public thoroughfare, is not an issue of "railroad safety" expressly preempted by the FRSAA. Preventing the obstruction of a grade crossing when it is within the reasonable control of the railroad operator is not implicated by Congress's desire to reduce railroad caused accidents, injuries, and deaths.

The FRSAA was designed to lessen direct loss of life or limbs or property damage caused by rail operations, not indirect injuries made worse by a rail

operator's blocking of a highway grade crossing. The Illinois Supreme Court erred when it found Mundelein's ordinance regulated "railroad safety" as that term is employed by the FRSAA.

B. The Illinois Supreme Court Failed to Analyze the Term "Cover" According to this Court's Holdings

Even if Mundelein's ordinance relates to "railroad safety," the FRSAA clearly contemplates that state legislation will not be preempted in two circumstances. The first of these occurs where the federal government has not adopted a regulation "covering the subject matter" of the state law. This provision reflects Congress's acknowledgment of a continuing role for the state regulation of railroad operations and railroad safety. The mere adoption of the FRSAA did not "instantaneously cover every safety hazard." *Missouri Pacific R. Co. v. Railroad Comm'n of Texas*, 833 F.2d 570, 573, n.3 (5th Cir. 1987) (citing See H.R.Rep. No. 1194, 91st Cong., 2d Sess., reprinted in 1970 U.S.CODE CONG. & AD.NEWS 4104, 4109).

For the Secretary's regulations to have a preemptive effect, railroad carriers must establish more than that the federal regulations 'touch upon' or 'relate to' the subject matter of a State or local law. The federal regulations must 'cover' the subject matter of the state law. *Easterwood*, 507 U.S. at 664, *see, also*, *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344, 352 (2000) ("for preemption to lie under the FRSA, both state and federal law must 'cover' the same subject matter"). "Cover" is a more restrictive term which indicates that preemption will occur only

if the federal regulations "substantially subsume" the subject matter of the relevant state law. The FRSAA displays considerable solicitude for state law because the express preemption provision is both prefaced and succeeded by express savings clauses. *Easterwood*, 507 U.S. at 664-65.

While the Illinois Supreme Court noted these teachings from *Easterwood*, it nonetheless found that regulations requiring air brake testing after certain events, regulating maximum speeds on certain classes of track, and governing trains with respect to grade crossing warning systems created a broad, comprehensive scheme regulating "train movement." The Illinois Supreme Court broadened the Secretary's regulations, interpreting them to cover train movement generally, rather than interpreting the regulations narrowly. This analysis of the federal regulations is contrary to this Court's holding that "general mandates" do not "cover the subject matter" of state laws. *Easterwood*, 507 U.S. at 668-69.

Under applicable Supreme Court precedent, the fact that federal regulations address specific aspects of train operations does not require preemption of local grade crossing obstruction regulations. The Illinois Supreme Court's decision and analysis failed to give Mundelein's ordinance the considerable solicitude it is due, leading to a decision that is contrary to this Court's teachings on this issue.

C. The Illinois Supreme Court Failed to Properly Analyze Whether Mundelein's Ordinance Is Incompatible with the FRSAA or Unreasonably Burdens Interstate Commerce

Mundelein's ordinance is neither incompatible with the FRSAA nor does it unreasonably burden interstate commerce. The Illinois Supreme Court hypothesized that to clear a grade-crossing within 10 minutes of stopping, a train operator might have to speed up beyond federal maximum speed limits. Therefore Mundelein's ordinance was incompatible with the federal regulations governing maximum speed. The court also hypothesized that to comply with federal air brake regulations, a train might have to block a grade crossing for more than 10 minutes. The court refused to conduct an individualized determination of whether in this case, the ordinance would result in any of the conflict imagined by the court.

However, this Court has long held that "the existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute." *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982), *see also*, *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) ("[a]lthough it is possible to envision circumstances under which price discriminations proscribed by the Robinson-Patman Act might be compelled by [the state statute], the existence of such potential conflicts is entirely too speculative in the present posture of this case" to warrant preemption," *citing Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 44, (1966). By hypothesizing situations in which Mundelein's ordinance might

require a railroad to take action in violation of a federal regulation, the Illinois Supreme Court sought out a speculative conflict that violates this Court's preemption teachings.

The court also hypothesized that a train operator could be required to adjust train length to clear the grade crossing within 10 minutes after stopping and that the ordinance therefore unreasonably burdened interstate commerce. The court relied on *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) for this proposition. In *Arizona*, this Court invalidated a state law that affirmatively required a change in train length. That situation is simply not presented by the facts of this case. Again, hypothetical situations should not be used to justify the preemption of state public health and safety laws.

II. THE ILLINOIS SUPREME COURT'S DECISION CONFLICTS WITH THE DECISIONS OF THE FEDERAL COURTS OF APPEAL AND OTHER STATE COURTS

The resolution of conflicts among the federal courts of appeals and the state courts of last resort on an issue of federal law is one of the primary justifications for this Court to grant certiorari. *See*, Sup. Ct. R. 10. There is a split among the lower courts with respect to the standard to employ under the FRSA, and this Court's intervention is needed to resolve this important and recurring question.

There are few decisions examining blocked grade crossing laws. The Illinois Supreme Court's decision is consistent with one federal court of appeals and two

state supreme courts in finding similar grade-crossing obstruction statutes preempted by federal regulations. *See, CSX Transportation, Inc., v. City of Plymouth*, 283 F.2d 812 (6th Cir. 2002); *Krentz v. Consolidated R. Corp.*, 910 A.2d 20 (Pa. 2006), *City of Seattle v. Burlington Northern R.R. Co.*, 41 P.2d 1169 (2002). The Illinois Supreme Court's opinion is in conflict with one state court of appeals decision, upholding a blocked crossing statute because no federal regulations addressed the specific subject matter of blocked crossings. *State v. Wheeling & Lake Erie Ry. Co.*, 743 N.E.2d 513 (2000).

However, when one considers the reasoning relied upon by the Illinois Supreme Court and the other courts that have invalidated blocked crossing statutes, a deeper split becomes evident. The analysis of the Illinois Supreme Court is in conflict with the analysis employed by the Fifth and Ninth Circuit Courts of Appeal. As mentioned above, the Illinois Supreme Court broadly interpreted federal regulations as governing "train movement." Both the Fifth and the Ninth Circuits have held that the FRSA preemption analysis requires *narrowly* construing federal regulations and engaging in specific analysis of federal regulations, not broadening the regulations to encompass general principles.

In *United Transportation Union v. Foster*, 205 F.3d 851, 860 (5th Cir. 2000), the Fifth Circuit stated that "when deciding whether the FRSA preempts state laws designed to improve railroad safety, we interpret the relevant federal regulations narrowly to ensure that the careful balance that Congress has struck between state and federal regulatory authority is not

improperly disrupted in favor of the federal government." The question in *Foster* was whether a Louisiana law requiring train operators use sound devices at specified locations was preempted by federal regulation governing sound equipment and whistle capacity. The Fifth Circuit found that the federal regulations did not "cover" the same subject as the state law. *Foster*, 205 at 862. *See also, Rushing v. Kansas City S. Ry. Co.*, 185 F.3d 496 (5th Cir. 1999).

In applying FRSA preemption, the Fifth Circuit "eschew[ed] broad categories such as 'railroad safety,' focusing instead on the *specific* subject matter contained in the federal regulation." *Foster*, 205 F.3d at 860 (*citing Easterwood*, 507 U.S. at 665-75); *see also, Rushing*, 185 F.3d at 515 (same). By giving the regulations at issue in this case broad effect, the Illinois Supreme Court's reasoning is in conflict with the holding of the Fifth Circuit eschewing broad categories.

Similarly, in *Southern Pacific Transp. Co. v. Public Utility Com'n of State of Or.*, 9 F.3d 807, (9th Cir. 1993), the Ninth Circuit Court of Appeals noted that this Court's FRSA teachings do not look broadly at categories such as "railroad safety," but rather look at the narrow categories such as "warning devices" when determining preemption. Applying that level of specificity in its analysis, the Ninth Circuit concluded that regulations promulgated under the FRSA did not preempt Oregon regulations restricting the use of whistles in certain circumstances. The "subject matter" of the federal regulations in that case was the sound-producing capacity of train whistles. By construing the subject matter of the federal regulations narrowly, the

court of appeals determined the capacity regulations did not "substantially subsume" the use of the whistles. As such, the federal regulations did not "cover" Oregon's regulations.

The Illinois Supreme Court's holding also conflicts with the holdings of the Supreme Court of Ohio, as detailed by *In re Miamisburg Train Derailment Litigation*, 626 N.E.2d 85, 93 (Ohio 1994), *cert. denied* by *Union Tank Car Co. v. Various Plaintiffs in Class*, 513 U.S. 809 (1994), where the court held that this Court's "substantially subsumes" language means that if a federal regulation does not "specifically address" the subject matter of the challenged state law, it does not "substantially subsume" and thus preempt it. The issue in that case was whether the plaintiffs could bring a negligence claim because train cars were not retrofitted with reinforcing pads between external attachments and the shell of the car. Federal regulations provided that train cars manufactured after a certain date must be outfitted with reinforcing pads, while earlier manufactured cars could continue in service. According to the Ohio Supreme Court:

> The mere general provision of Section 179.1(c), Title 49, C.F.R., that tanks mounted on or forming part of a tank car "built to specifications predating those in this part may continue in use" is not equivalent to an affirmative specific statement that the owner or operator of a tank car built prior to 1971 is under no duty to retrofit with reinforcing pads; and is also not equivalent to the further specific statement that one who does not retrofit a pre-1971 built tank car with reinforcing pads is

> shielded from liability under state tort law. Due to its lack of specificity, Section 179.1(c) does not "cove[r] the subject matter" of appellants' claims.

In re Miamisburg Train Derailment Litigation, 626 N.E.2d at 93.

The Ninth Circuit similarly has held that "[f]or purposes of § 434 of the FRSA, a state regulation 'covers the same subject matter' as an FRA regulation *if it addresses the same safety concerns* as the FRA regulation." *See*, *Burlington N. R.R. v. State of Montana*, 880 F.2d 1104, 1105 (9th Cir. 1989), *see also*, *106 Southern Pacific Transportation Co. v. Public Utilities Comm. of California*, 647 F. Supp. 1220, 1225 (N.D. Cal. 1986), *aff'd*, 820 F.2d 1111 (9th Cir. 1987) (per curiam); *State v. Wisconsin Cent. Transp. Corp.*, 546 N.W.2d 206, 211 (Wis. App. 1996).

The Illinois Supreme Court failed to properly consider a narrow interpretation of the federal regulations at issue, choosing instead to broadly review the scope of the regulations by finding the regulations govern "train movement." This shallow treatment of the question conflicts with the holdings of the Fifth and Ninth Circuit which require a narrow and specific inquiry in the preemption context.

Further, the Illinois Supreme Court opinion that the ordinance unreasonably burdens interstate commerce is in direct conflict the Massachusetts Supreme Court opinion in *Commonwealth v. New York Central Railroad Co.*, 216 N.E.2d 870, 873 (Mass. 1966), holding that a grade crossing ordinance did not

unreasonably burden interstate commerce. The court noted that "[s]hould this statute be struck down, trains might occupy crossings indefinitely leaving the highways in a continuing state of chaos."

The Illinois Supreme Court's preemption analysis is in conflict with other state supreme courts and with federal courts of appeal. This Court's intervention is required to resolve the conflict.

III. THE ISSUE OF THE PREEMPTION OF STATE AND LOCAL HIGHWAY-GRADE CROSSING PROHIBITIONS IS OF VITAL FEDERAL IMPORTANCE

Even aside from the clear conflict in the lower courts, this Court should grant certiorari because of the overarching importance of this preemption issue. If the Illinois Supreme Court is correct, and railroads cannot be forced to move their trains through grade crossings when it is within their reasonable control to do so, "the public would be unprotected indefinitely." *Id.* For example, if the Illinois Supreme Court's decision is correct and the federal regulations govern "train movement," thereby preempting all state and local statutes requiring grade-crossing obstructions be removed within a specified time period, train operators can stop on grade crossings for any whim – to have a smoke, talk on a cell phone, or simply admire the scenery. When it adopted the FRSA in response to growing concerns about threats to public safety, Congress did not intend to reduce public protection by creating regulatory voids, for "otherwise the public would be unprotected by either state or federal law."

Thiele v. Norfolk & Western Ry. Co., 68 F.3d 179, 184 (7th Cir. 1995).

Examining the sheer practical effect of blocked and obstructed grade crossing shows how important the federal preemptive scope of the FRSA and its regulations are. Between 241,000 and 260,000 public and private highway-rail grade crossings exist in the United States today. *See, Compilation of State Laws and Regulations on Matters Affecting Highway-Rail Crossings* at iv, Federal Railroad Administration ("FRA") (March 1999), available at *www.fra.dot.gov/downloads/Safety/cross_intro.pdf*, last visited April 15, 2008 and FRA Issue Brief, *Blocked Crossings*, available at *www.fra.dot.gov/us/content/907*, last visited April 15, 2008. Many of these crossings are in highly populated cities, towns, and suburbs, increasing the impact of grade-crossing obstructions. Throughout the country, citizens on the way to work or other obligations, businesses attempting to engage in commerce, and emergency services personnel engaged in life-saving work are affected by blocked grade crossings. Twenty-nine states in addition to Illinois have statutes governing the length of time a train may stop and block a grade crossing.[1]

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[1] Ariz. Rev. Stat. Ann. § 40-852; Del. Code Ann. Title 17, § 701; District of Columbia, 18 DCMR § 2211.7; Fla.. Stat. Ann. § 351.034; Idaho Code § 49-1425; Ind. Code Ann. § 8-6-7.5-1; Iowa Code § 327G.32; Kan. Stat. Ann. § 66-273; Ky. Rev. Stat. Ann. § 277.200; La. Rev. Stat. Ann. § 48:391; Mass. Ann. Laws ch. 160, § 151; Mich. Comp. Laws Ann. § 462.391; Minn. Stat. § 219.383 (3); Miss. Code Ann. § 77-9-235; Mont. Code Ann. § 69-14-626; N.H. Rev. Stat Ann. § 373:15; N.J. Rev. Stat. § 39:4-94; N.Y. [R.R.] Law § 53-c; N.D. Cent. Code, § 49-11-19; Ohio Rev. Code Ann.

The importance of addressing grade-crossing obstructions is recognized by the FRA, the administration charged with regulating railroad safety. The FRA recognizes that blocked crossings jeopardizes first responders ability react to emergencies, leads to citizens violating grade crossing prohibitions and adversely affects businesses and citizens by inhibiting their movement. The FRA has stated:

> The Federal Railroad Administration (FRA) is well aware of the safety hazards associated with blocked crossings. Blocked crossings can impede the movement of emergency response vehicles, be an inducement to crossing violations and trespassing, and adversely affect the quality of life in our communities. With the growth of rail traffic and continued railroad mergers concentrating that traffic on fewer lines, the problem will persist.

Blocked Crossings Issue Brief.

The FRA has further stated that while it aims to provide a safe environment for the movement of trains, its regulations do not regulate the amount of time a railroad can block a crossing:

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§ 5589.21; R.I. Gen. Laws § 39-8-4; S.C. Code Ann. § 57-7-240; S.D. Codified Laws Ann. § 49-16A-119; Tex. [Transp] Code Ann. § 471.007; Utah Code Ann. § 41-6a-1204; Vt. Stat. Ann. 5-68-358; Va. Code Ann. § 56-412.1; W. Va. Code § 31-2A-2; Wis. Stat. § 192.292.

> FRA's Role – FRA's regulations provide an environment for the safe movement of trains. They cover track, equipment, operating practices, signal systems, the transporting of hazardous materials, and the maintenance of automated warning devices (flashing lights and/or gates) at highway-rail crossings. The FRA, however, does not regulate the length of time a railroad may block a crossing.

Id. Under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) and *United States v. Mead Corporation*, 533 U.S. 218 (2001), the FRA view of the scope of its regulations is entitled to deference.

The FRA also recognizes that "the issue of a State's authority to legislate or regulate blocked crossings is highly contentious and still being defined in the courts." *Impact of Blocked Highway/Rail Grade Crossings on Emergency Response Services* at 16, Federal Railroad Administration, (August 2006). Further, the Uniform Vehicle Code (UVC), a comprehensive guide designed to help States develop standard motor vehicle and traffic laws, trains should not block crossings for more than five minutes, except under special circumstances (*e.g.*, if a train is disabled; or if no vehicular traffic is waiting to use the crossing; or if it is necessary to comply with signals affecting the safe movement of trains). Highway-Rail Grade Crossing Model Law, National Committee on Uniforms Traffic Laws and Ordinances, *http://www.ncutlo.org/railgrade05.html,* last visited April 23, 2008. In light of the undefined nature of state and local governments' authority to minimize grade crossing obstructions, in light of the FRA's contention that it

does not regulate the length of time a train may block a highway grade crossing, and in light of the fact that the UVC advocates prohibiting obstructions of more than 5 minutes in length, this Court's intervention is need to bring certainty to this area of federal regulation.

CONCLUSION

The petition for writ of certiorari should be granted.

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